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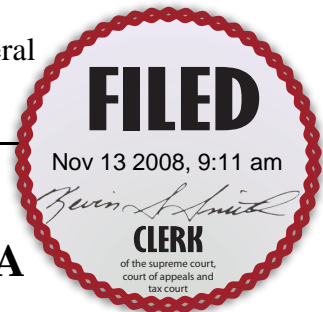
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**IN THE
COURT OF APPEALS OF INDIANA**



JOHN D. KWIATKOWSKI,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 75A03-0806-CR-295

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0709-FB-13

November 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

John D. Kwiatkowski appeals from his convictions after a jury trial for burglary,¹ a Class B felony and theft,² a Class D felony. Kwiatkowski raises the following restated issues for our review:

- I. Whether Kwiatkowski's trial counsel was ineffective by failing to pursue a speedy trial request, failing to conduct deposition discovery, and failing to challenge an alternate juror for cause; and
- II. Whether there was sufficient evidence to support Kwiatkowski's convictions for burglary and theft.

We affirm.

FACTS AND PROCEDURAL HISTORY

Ralph Allen Puckett lived in Walkerton, Indiana, in Starke County. On September 13, 2007, Puckett returned home from work at approximately 6:00 p.m. and discovered that someone had removed the screen from his front window. Puckett remembered leaving the front window open to air out his home, but the screen was in place when he left, and missing when he returned from work. While entering his home through his garage, Puckett noticed that some of his belongings were missing, the back door on his screened-in porch was forced off its hinges, and the door from the garage to his basement was kicked open. Puckett found that the brick that had held the lid to his septic tank in place had been knocked off, that there were tire marks in his backyard near the septic tank cover, and that there were footprints in his flowerbed, the imprint of which did not match the soles of any shoes Puckett owned.

¹ See Ind. Code §35-43-2-1.

² See Ind. Code §35-43-4-2.

Puckett walked through the rest of his house, found that no one was there, and called the police. While he waited for the police officers to arrive, Puckett called his cousin, Derek Stone, who came over to Puckett's house. Puckett walked across the street and asked his neighbors, Yvonne and Robert Burrell ("the Burrells") if they had seen anything. The Burrells told Puckett that they had seen a light blue station wagon sitting in Puckett's driveway earlier that day.

Puckett returned to his house and told Stone about the light blue station wagon. Stone left to see if he could find the vehicle and returned after seeing a light blue station wagon parked at a residence approximately one mile down the road. Meanwhile, officers from the Starke County Sheriff's Department had arrived at Puckett's home, and Puckett and Stone told them the information that they had regarding the station wagon. Puckett also told the officers about the items he had determined were missing from his home at that time. Puckett was missing a computer, a home theater surround sound system, and equipment such as ladders, drills, saws, and other tools, from his construction company, Puckett Construction. Puckett had not yet determined all of the missing items because many of his possessions were strewn about the home.

The officers left and searched for a light blue station wagon. Ultimately, the officers spotted the suspect vehicle parked outside the residence of John and Patricia Kwiatkowski. The Kwiatkowskis told the officers that Kwiatkowski, their son, lived with them in his own room in the house. Kwiatkowski had been unemployed except for odd jobs, and his mother provided him with transportation to apply for jobs. The day before the burglary at Puckett's residence, the Kwiatkowskis had purchased a light blue station wagon for their son to use

when he found work. The station wagon was registered in Kwiatkowski's name. Patricia told the officers that the station wagon had not moved that day, except when Kwiatkowski took it to get the oil changed in the late morning. The Kwiatkowskis were not sure where Kwiatkowski was at the time the officers arrived at their house.

The officers told the Kwiatkowskis about the burglary and that a blue station wagon had been seen. When asked, the Kwiatkowskis agreed to let the officers search their home, and Patricia opened the garage door for them. The officers searched the shed, the garage, and Kwiatkowski's bedroom.

Inside the garage, the police found Puckett's stolen home theater system. Inside Kwiatkowski's bedroom the officers discovered Puckett's computer. Inside the shed the officers found the printer for the computer, as well as a trunk taken from Puckett's house. Inside the trunk, the officers found mail belonging to Puckett. The blue station wagon was at the Kwiatkowski residence, but was not searched at that time. Patricia indicated that none of the property recovered belonged to her, her husband, or her son.

The officers took the recovered items to Puckett's home and returned the items to him after Puckett had given them a description matching the recovered items. The police recovered all of the components of Puckett's computer in addition to speakers and a DVD player from his home theater system.

Puckett further examined his home the day of the burglary, after the officers had left and the following day, in order to determine if other items were missing. Puckett discovered that some of his carpenter's tools, a weed eater, a camera, and a video camera were missing. Also missing was Puckett's wooden trunk he kept in his bedroom closet in which he stored

knives, pictures, and collectibles. A safe was missing from Puckett's basement. The tools that were missing, a circular saw, a concrete gun, a router, and a chop saw, were all labeled "Puckett Construction."

Puckett saw the blue station wagon the day after the burglary and reported the sighting to the police. Officers went to the Kwiatkowskis' home and received John's permission to search the home again for stolen items. The officers found the chop saw, circular saw, router and cement gun marked "Puckett Construction" during this search. The light blue station wagon was at the Kwiatkowski residence at the time of the search.

John gave the officers consent to search the house for Kwiatkowski, and they found him hiding behind an entertainment center. The officers transported Kwiatkowski to the police station because he was wanted on warrants for other charges and for questioning about the Puckett burglary. Kwiatkowski told one of the officers that he knew the recovered items were stolen, but that he did not steal them. He told the officer that a small white boy named "Joe" from Walkerton always brought things to Kwiatkowski, and that he traded quarter-ounce and half-ounce bags of marijuana with "Joe" in exchange for the property.

Kwiatkowski admitted ownership of the vehicle, but told the officer that no one else used his light blue station wagon on the date of the burglary. During the interview, the officer did not tell Kwiatkowski what home had been burglarized. Kwiatkowski volunteered to the officer that if he were going to steal from a neighbor, he would not keep the stolen property in his garage.

The officer went to Puckett's home to process the scene and showed Puckett the other items that were recovered, specifically the tools labeled "Puckett Construction." During the

investigation, the officer received a lead from Kwiatkowski's cell mate about the location of the safe that was stolen from Puckett's property. The officer received consent from John to search his home for the safe and located it. Puckett identified the safe and opened the combination lock revealing the contents inside belonging to Puckett.

The officer returned to Puckett's home to process the scene, dusting for prints and taking photographs. Puckett showed the officer the footprint left in his flowerbed. The officer determined that the soles of Kwiatkowski's shoes matched the print left under Puckett's window. The officer never learned the last name of "Joe," and confirmed that all of the stolen items, which she could lift without assistance, could fit into the station wagon, the third seat of which was down when seen at the Kwiatkowski residence.

The Indiana State Police arrested Kwiatkowski for the burglary. Ultimately, the State charged Kwiatkowski with burglary,³ a Class B felony; theft,⁴ a Class D felony; and two counts of receiving stolen property,⁵ each as a Class D felony. Kwiatkowski successfully argued to have the two counts of receiving stolen property severed. The jury returned guilty verdicts against Kwiatkowski on the burglary and theft counts, and the State subsequently dismissed the two counts of receiving stolen property. The trial court sentenced Kwiatkowski to an aggregate sentence of fifteen years executed. Kwiatkowski now appeals.

DISCUSSION AND DECISION

³ See Ind. Code §35-43-2-1.

⁴ See Ind. Code §35-43-4-2(a).

⁵ See Ind. Code §35-43-4-2(b).

Kwiatkowski argues on direct appeal that he received ineffective assistance of trial counsel during the pre-trial and trial proceedings when counsel: a) failed to file a request for speedy trial; b) failed to conduct deposition discovery; and c) failed to object to the third cousin of an investigating police officer serving as an alternate juror in this case.

There is a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. *Walker v. State*, 779 N.E.2d 1158, 1161 (Ind. Ct. App. 2002). As for counsel's performance, we give considerable deference to counsel's discretion in choosing strategy and tactics. *Id.* Accordingly, a defendant must show more than isolated poor strategy, bad tactics, a mistake, carelessness, or inexperience; the defense as a whole must be inadequate. *Law v. State*, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003). To prevail on a claim of ineffective assistance of counsel, Kwiatkowski must show (1) that counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms, and (2) that the lack of reasonable representation prejudiced him. *See Shane v. State*, 769 N.E.2d 1195, 1200 (Ind. Ct. App. 2000). Essentially, Kwiatkowski must show that, but for counsel's deficient performance, the result of the proceedings would have been different. *See Law*, 797 N.E.2d at 1161. We will find prejudice when the conviction or sentence has resulted from a breakdown of the adversarial process that rendered the result unjust or unreliable. *Id.* at 1161-62. If we can easily dismiss an ineffectiveness claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient. *Id.* at 1162.

Kwiatkowski fails to establish prejudice in light of the alleged errors. Kwiatkowski's car was at Puckett's home when the burglary occurred. Puckett's property was found at

Kwiatkowski's home, including in his bedroom. Kwiatkowski admitted ownership of the car and that he knew the recovered property was stolen. The pattern on the soles of Kwiatkowski's shoes was similar to those left in Puckett's flowerbed under a window. Kwiatkowski volunteered that the scene of the burglary was a neighbor's house without being told that information by the police officers who were questioning him. Kwiatkowski's cell mate learned from him the location of the stolen safe in Kwiatkowski's home. Given the overwhelming nature of the evidence, it is highly unlikely that the outcome would have been any different if Kwiatkowski's trial counsel had deposed witnesses, made a speedy trial request, or objected to the third cousin of the investigating officer serving as an alternate juror in the case.

Likewise, we find that Kwiatkowski's argument about the sufficiency of the evidence fails. As stated above, the evidence supporting the convictions was overwhelming. The State mistakenly charged Kwiatkowski with committing the burglary and theft on two separate dates. However, as Kwiatkowski acknowledges, time is not normally an essential element of the crime of theft. *See* Ind. Code §35-43-4-2. The one-day difference in the dates used in the charges is of no moment here. The evidence was sufficient to support the convictions.

Affirmed.

VAIDIK, J., and CRONE, J., concur.